

The following translation, by Dennis Nattkemper (edited by David Mirhady), completes the translation of Harald Meyer-Laurin, *Gesetz und Billigkeit im attischen Process*. The translation of the first part of the work, by David Mirhady (corrected by Dennis Nattkemper), is published in *The Attic Orators*, edited by Edwin Carawan, in the *Oxford Readings* series (forthcoming).¹

V. The Principle of Law and Equity in Legal Discourse

1. Dikaiotate Gnome

The Athenian dikasts swore, before the trial they were selected for by lot, an oath concerning their performance as judges. The wording of the oath included the duty to judge according to the laws [p. 29] and decrees of the polis and, in cases when legal direction was not available, to decide according to *dikaiotate gnome* (Dem. 20.118 *having sworn to judge according to the laws . . . and concerning those things about which there were no laws to determine by the dikaiotate gnome*).²

In the literature, it has been repeatedly claimed that the judges were in this way allowed to rule according to the *dikaiotate gnome* not only when a law was lacking but also when the law allowed them no just decision. In truth, however, the oath will have had the goal of subordinating the activity of the judges, like that of every other office to which an Athenian citizen was chosen, to the rule of law. As Wolff has said, the *dikaiotate gnome* was only “a subsidiary means of jurisprudence, which might be used when legal ordinances were lacking” (1962, 18).³

Such a regulation became necessary when there were no longer mandatory rules of evidence, according to which the dikasts had to decide, and free evaluation of evidence came to prevail. Since the laws, like witness statements, documents, statements of slaves under torture, and oaths, procedurally belonged to the *atechnoi pisteis*, there was a need for an explicit limitation of the free evaluation of evidence in order to bind the judges to the laws. The oath was consequently to uphold the otherwise superseded formal theory of evidence with regard to the *nomoi*.

That the formulation of the oath was in fact related to the evaluation of evidence becomes clear from the way it is mentioned [p. 30] in the sources. It is significant that the sharp distinction between *dikazein* and *krinein* (‘judge’ and ‘determine’), which was once a significant part of the formal evidentiary system, is still maintained in Dem. 20.118. It is the same distinction as that indicated, in the law of Gortyn, when the judge had to make a judgement (*dikadden*) on the basis of a formal proof and when he could determine (*krinen*) without restriction according to his own assessment. In Herodas’ Second Mime, a decision according to *gnome dikaia* is compared to a judgement that does not rest on witness statements (2.85 *there being no witnesses, arbitrate the judgment by just gnome*). Moreover, in the oath of the arbitrators of Knidos, it stood written on the stone of Kalymna—if the restoration is correct—in one breath, that the judge should decide according to *dikaiotate gnome* and not feel himself bound to a witness statement if it seemed to

¹ Meyer-Laurin gives copious references to previous scholarship. These have been omitted, except where he makes specific references to them in the text or where there is discussion of their positions in the footnotes.

² [=99] See also Is. 11.6; Isoc. 18.34; Hyp., *Eux.* 40; Dem. 24.149ff., 39.40, 57.63, 58.36; the Delphic Amphictionies *IG* 2.545; Collitz-Bechtel II/2501; *Syll.* 145.

³ [=101] On the other hand, Ruschenbach (1957 266) believes that the wording of the judges’ oath “concerning matters about which there are no laws, to judge by the most just *gnome*,” is superfluous, because the individual laws were partly formulated in such a way that they were able to encompass all possible cases.

him not to correspond to the truth: “I shall judge concerning the things about which the litigants counter-swear according to the most just *gnome* and I will not judge according to a witness if he does not appear to give true testimony.”⁴

The applications of law and of *dikaiotate gnome* were precisely set out through the oath and separated one from another. The principle of the rule of law was not limited by the *dikaiotate gnome* but complemented by it. Otherwise, any circumstances not foreseen in the laws would not have been judiciable. An example of such a dispute, which was conducted without a basis in law but according to *dikaiotate gnome*, is that of Mantitheus against Boiotus *On the Name* (Dem. 39). It probably involved simply a *diadikasia* over the rights to a name.⁵ [p. 31] There was apparently no law that regulated such rights. Before the Heliasts, the speaker appeals therefore to the *logos tou dikaiou* (29) and requests a decision according to *dikaiotate gnome* (40-1).

2. Arbitrariness

Despite the oath binding the judges to the laws, the sources often characterize the actual exercise of judicial power as arbitrary and unpredictable.⁶ In view of the frequency [p.32] of the accusations, there is probably no doubting that there was a certain arbitrariness in the dispensation of justice.

Deliberate perversions of justice probably occurred primarily in the increasingly frequent political trials. One of the few known examples in which the dikasts allowed themselves to be guided by their passions is the trial against Ctesiphon (Aesch. 3, Dem. 18). Aeschines, who acted as prosecutor, had the letter of the law on his side. Nonetheless, he failed to convince the judges and lost against Demosthenes, who argued for Ctesiphon. Because of its high political importance, the outcome of the trial depended less on the question of the legality of Ctesiphon’s decree. Rather, after the defeat at Chaeronea, it was a political statement by the Athenians in support of the anti-Macedonian party, of which Demosthenes was the leader, and against Philip’s supporters, one of whom was Aeschines.

The infamous assembly in which the victorious admirals of the Battle of Arginusae were summarily tried for neglecting to recover and bury the dead does not really fall into this category.⁷ In this case, the trial itself was already illegal because the assembly did not have a judicial function. Socrates, who happened to chair the proceedings, unsuccessfully cautioned the Athenian citizens not to give in to arbitrariness and political passion.⁸

⁴ [=104] *Syll.* 4 953; *Recueil* 1.159; Collitz-Bechtel III/3591.

⁵ [=105] The term *amphisbetein*, characteristic for a *diadikasia*, is used twice in the speech (11 *for these must happen when we ‘dispute’ over an office or something else, 28 at that time you did not suppose you had any connection even with my tribe, how could you ‘claim’ to be related to my grandfather?*). Gernet 1954/57 12ff. and, most recently, Furkiotis 1962 12, 41ff. identify the case as a *dike blabes*. Gernet cites in particular 5: *how much damage he did, first to me and then also to you, I shall show. . .* The use of the word *blaptein* gives no indication, however, for the use of the *dike blabes*. Cf. Pringsheim 1953, 53 n.1. Furkiotis 36ff. even believes that the speech appeals to an absolute right to a name, which was recognized by the Greeks. However, this appears to follow modern legal thought too closely and does not do justice to the archaic character of ancient Greek law. In particular, it is inconceivable that, as the scholar thinks, a *dike blabes* could be used to file for injunctive relief. This suit was always for the sentencing to a fine for damage, but did not grant anything like a preventive legal protection against an imminent limitation of absolute rights.

⁶ [=106] Thucydides 3.38.4ff.; Plato, *Gorgias* 515E; *Apol.* 28A; *Crito* 46-46C; *Nomoi* IX 876b-e; Xen. *Apol.* 4; Aristophanes, *Achar.* 375-6, 686; *Knights* 1356ff.; *Wasps* 550ff., 579ff. Collected in Fränkel, 1877.

⁷ [=109] It was a panhellenic custom, rather than law, to ensure the honorable burial of the fallen, even if it required a new campaign. Cf. Euripides, *Supp.* 670ff.; *Helen* 1241.

⁸ [=110] Plato, *Apology* 32B

On the other hand, there are also cases in which the Athenians maintained a remarkable loyalty to the laws. This is shown by the outcome of the *eisangelia* by Lycurgus against Leocrates. Leocrates learned of the Athenian defeat at Chaeronea ahead of time and consequently fled from Athens with his family and part of his wealth. When he returned after eight years, Lycurgus had him arrested and tried, because, after the defeat became public, legal decrees [p. 33] forbidding people to leave the city were passed (Lyc. 1.16, see also 52-3). Despite the orator's high renown, the suit was dismissed because Leocrates had already left Athens when the decrees were passed. Since the law was evidently not retroactive, the prohibition did not apply to him.

The judges in Demosthenes' suit against Aeschines *On the False Embassy* (Dem. 19, Aesch. 2) acted just as objectively. In the end, Demosthenes could not present any concrete evidence for his accusations. However, the Athenians strongly suspected Aeschines of being guilty, as shown by the blemish that followed him afterwards and hindered his further political ascent. Nevertheless, he was acquitted. Interestingly, Hyperides had previously sued Philocrates over the same matter. The latter did not dare face the judges and avoided the trial by fleeing.

From the cited examples, a certain tendency seems to emerge. The possibility that a trial is judged according to extra-legal considerations is especially considerable in cases that came to trial immediately following a political event connected to the case. When the excitement had passed, on the other hand, judgments were again made strictly in accordance with the laws.

This is also indicated by the speech by Isocrates *Against Kallimachos* (Isocr. 18). The orator feared political bias from the judges. At the same time, we learn that no one before Kallimachos had brought a suit on the basis of incidents from the time of the civil war (38: *of whom no other has dared to bring such a suit*) and that it was the first suit after the decree of the law of Archinos (1-2). On the other hand, Lysias, after his return, but likewise still in the year 403 BC, had unsuccessfully sued the informer against his brother Polemarchos, who was executed by the Thirty.

Whether arbitrary decisions also extended to civil suits, in which the public sympathies and the interests of the [p. 34] heliasts as citizens of the city were far less touched upon⁹, cannot be investigated, as the outcome of private lawsuits is almost never passed down. The proverbial Athenian penchant for trials¹⁰ expresses rather a certain trust into the dispensation of justice. Apart from the undifferentiated statements of poets and thinkers, the orators only raised such accusations in matters of state or criminal trials.¹¹ The only exception, Isocr. 18.9-10, is from a case that has an obvious political background, despite the emphasis on its private character.

Even assuming that the laws were occasionally deliberately not applied, this says nothing about a dispensation of justice based on equity. On the contrary, the more arbitrary judgments were made, the less room remained for equity considerations.

3. Interpretation

Because the wording of the laws was archaic and kept partially unclear deliberately by the lawgiver, as Aristotle reports, misunderstandings and disagreements resulted that sometimes required an interpretation (*Ath. Pol.* 9.2). Some authors have concluded from this that the Athenian courts reached a dispensation of justice based on equity through an extremely free interpretation and application of the laws. The generous handling of legal prescriptions is said to be especially noticeable in regards to wills and contracts [p.35].

a) Wills

⁹ [=115] Lys. 21.12, Dem. 24.192f. For the partly different development of criminal and civil proceedings see Steinwenter, 1925 and Wolff, 1946.

¹⁰ [=116] Aristophanes, *Peace* 505; *Birds* 40-1.

¹¹ [=117] Lys. 25.3, 30.1; Isocr. 7.33-4, 54, 8.129-30, 15.142, 18.9-10; Dem. 20.166, 21.189, 23.206.

It has been repeatedly assumed that the Athenian dikasts gave precedence to the claims of the next of kin over heirs included in a will for reasons of equity. In this argument, one of the Aristotelian *Problems* is wrongly brought in.¹² It reflects rather the judges' fear of being led to a wrong verdict by deception, rather than the principle of annulling a will on grounds of equity in favour of the heirs not included in the will: (*Why is it that in some courts votes are given to birth rather than to wills? Because it's impossible to lie about birth but only to reveal what is true, but many wills have been proved to be false. Prob. 29.3 950b5ff*)

As the only example from practical experience, Vinogradoff (1922 20ff) cites the speech of Isaeus *On the Estate of Cleonymus* (Is. 1). However, analysis of the speech has shown that the orator did not appeal to blood relation, but, as in all other cases of the contestation of a will, to the volition clause in the law of wills. The close kinship to and the friendship with the bequeather was probably only mentioned as proof of the insanity of the testator.¹³

b) Contracts

The speech of Hyperides *Against Athenogenes* is cited several times as a clear attempt to persuade the judges to an equitable interpretation of contracts. The incorrectness of this assumption is apparent in its toilsome use of analogies. The interpretation of a contract clause is also treated in the pseudo-Demosthenic speech *Against Dionysodoros* (Dem. 56). As the analysis has shown, a free interpretation was also not demanded here; rather, the parties intended to outdo each other in terms of the literal interpretation of the contract's text [p.36].

Both speeches have an "overly fearful, formalistic clinging to the letter of the law"¹⁴ in common, which can also be observed elsewhere. It can only be explained with the assumption that the courts tended to support whoever could most clearly appeal to the laws. A clear proof of this is the defence of Theomnestos against the *dike kakegorias* brought by Lysias' client Lysitheos (Lys. 10/11).

The defendant admitted to accusing the prosecutor of killing his own father (Lys. 10.6, 21: (*to have killed*)). However, he pleaded that in the law only very certain terms (*aporrheta*), in this case only the use of the word "murderer" (*androphonos*), carry a penalty, none of which he used (Lys. 10.6).

This case was jurisdictionally first assigned to a public *diaitetes*, who indeed agreed with the legal position of Theomnestos and dismissed the suit. Upon the *epheisis* of the prosecutor, the suit came before the court of heliasts. In his speech, the prosecutor points out that the defendant would primarily call upon the letter of the law in his defence. In response, he proposes "For my part, gentlemen, I hold that your concern is not with mere words but with their meaning, and that you are all aware that those who have killed someone are murderers, and that those who are murderers have killed someone. For it was too much of a task for the lawgiver to write all the words that have the same effect; but by mentioning one he showed his meaning in regard to them all" (Lys. 10.7).

One should expect that this advice should sufficiently weaken the argument of the defence. If, however, the orator still considers it necessary to refute repeatedly the opposing view of the law and to use outdated formulations in old laws to show the still valid meaning independent of wording (Lys. 10.15-20), then the only logical conclusion is that the defence [p. 37] of Theomnestos must have been well-founded and – significantly – that Lysias expected the dikasts, as the *diaitetes* already had, to rely in a positivistic way only on the terms indicated in the laws.

¹² [=121] Cf. Is. 1.41 and Aristophanes, *Wasps* 583ff.

¹³ [=122] See also Is. 2.19, 6.21, 29; Dem. 48.56. Cf. Vinogradoff 1922 67.

¹⁴ [=125] Wolf, 1950/1956, III 167.

Believing in a far-reaching interpretation of the laws by the judges, some scholars have believe that there is a considerable degree of jurisprudence among the Athenian dikasts.¹⁵ This was convincingly opposed by the argument that the Athenian public courts consisted of laymen who were chosen by lot from among the citizenship without any professional qualifications. Their qualification merely depended on three conditions: that they possessed the full rights of a citizen, had a minimum age of thirty, and were free from state debt.¹⁶ Even if it is correct that some judges possessed sufficient knowledge of the law and the ability to grasp legal problems, the possibility was low that a unitary, much less progressive, notion of law could have formed within *dikasteria* consisting of up to several hundred men. That possibility was further lowered, or made utterly impossible, because the heliasts cast their votes without discussion.¹⁷ The question whether it is beneficial [p. 38] to trust so many citizens with the role of judge in the *dikasteria* was already raised by contemporaries.¹⁸

The speech of Demosthenes *Against Aristocrates* (Dem. 23) gives some insight into the development of verdicts. The speaker had initiated a *graphe paranomon* and wanted to show with his speech that a *psephisma* brought by the defendant stood in conflict with the laws of the polis. In order to weaken the anticipated defence of Aristocrates, that many men already were accused of this but acquitted, he cited that (95): *that is no indication of the legality of his proposal; there are (only his) many pretences, through which you have often been deceived*. Demosthenes speaks about a deception of the judges, because of which the accused in earlier trials were acquitted. What the orator wanted to express with this has been cleared up by Wolff (1962 13). It is not so much about “the previously accused gaining their acquittals via fraudulent misrepresentations, but rather about how they managed to convince the assembled court of the agreement of their proposed laws with the general legal order of the city.” The Athenian dikasts received information not only about the *quaestio facti* but also about the [p. 39] *quaestio iuris* exclusively from the speakers.¹⁹ The prosecutor presented the laws in question. The defendant could at best present opposing laws or use interpretation to prove the agreement of his proposal with the laws of the polis. In contrast, there was no room left for an interpretation of the laws by the judges.

4. Timema

¹⁵ [=128] Gernet 1955 67; Vinogradoff 1922. Calhoun 1944 31ff. also still overestimates the legal education of the dikasts.

¹⁶ [=129] This may not have disqualified the dikasts from having an understanding of legal matters, especially if they could have made some experiences in other public offices before being elected judges. See Pringsheim 1950 5; Calhoun 1944 35-7; Wolff 1945 103.

¹⁷ [=130] Aristotle (*Pol.* 2.5.8 1268b10-11) rejects the proposal by Hippodamas of Miletus, that the judges should discuss the decision with each other, by pointing out that most lawgivers intended to exclude precisely this possibility: *but it is not practicable in the law-courts, but the contrary to this is actually provided for by most lawgivers, who prohibit consultation between the dikasts*. See Zepos 1953 376-77.

¹⁸ [=131] Pseudo-Xenophon, *Ath. Pol.* 3.7. However, a reform of the existing system is discarded in 3.8. See Wolf 1950/56 152. Bonner-Smith 296 Jones 125 and Ruschenbusch, *Historia* 6 1957 262 consider the large popular courts in appropriate, since the family relationships described in the speeches are so complicated that one could only understand them with the help of genealogical tables. They refer to the statement of the speaker in Dem. 43.18, that he had intended to show the court a family tree, but had abandoned his plan because only part of the dikasts could have seen the sign. On the other hand, the city's inhabitants at that time almost all knew each other - unlike modern readers - and were largely familiar with family relationships. See Is. 1.41: *For you all know what a family relationship is, and it is impossible to misrepresent it to you*, Aristot., *Prob.* 29.3 950b5-7: *it's impossible to lie about birth but only to reveal what is true*.

¹⁹ [=133] Pringsheim 1950 2: “The rule was: *iura non novit curia*.”

With their verdict, the dikasts only had the option of fully supporting the claim of one of the two parties. If the trial was *atimetos*, there was only the possibility either to convict the accused with the fine set down in the law or to acquit him fully. In an *agon timetos* the judges could only choose between the parties' proposals. To seek the just verdict for the specific case was a prerogative of the speakers in the *litis aestimatio*. As Paoli (1933 68) accurately remarked, this resulted in the paradoxical situation in which the accused was obliged to move for a fine against himself that was not too low, while the prosecutor didn't dare to make excessive demands, so that the dikasts wouldn't support the opposing *timema* rather than the one that was too removed from the just middle.

In the speech *Against Nicostratos* (Dem. 53.15-8), Apollodorus mentions a case in which the judges wanted to convince him to ask for the death penalty, which seemed to be unavailable to them. He, however, had gone along with the defendant's motion for a fine of one talent, so that the judges could only sentence him to that (18: *and in the assessment of penalty, while the dikasts were deliberating about imposing the death penalty on him, I asked the dikasts not to do such a thing through me, but I agreed to one talent, which is what they then imposed*). In spite of the scepticism about the details of Apollodorus' exposition, it can be seen that the judges, even when the *timema* appeared inadequate to them and they would have liked to deviate from it, nonetheless were bound to it, unless one party adjusted its *timema* according to the judges' wishes [p. 40].

The commitment to the *timema* was closely related to the principle of law. Famously, Aristotle rejected the proposal of Hippodamas of Miletus to provide every member of the *dikasterion* with a writing tablet instead of a voting stone, so that the dikasts could also partially sentence or acquit the accused according to their interpretation (*Pol.* 2.5.8 1268b6-7). Aristotle argued that such judges would no longer be dikasts, but rather *diaitetai* (arbitrators), of whom he says elsewhere that they judge according to equity, unlike dikasts (*Rhet.* 1.13 1374b19ff.).²⁰

Still in the second century BC, the principle of law as a basis is clearly demonstrated in the example of the standardization of discretionary decisions in the war resolution law of Ephesus.²¹ After the end of a two-year war, this law regulated the liabilities of mortgage debtors, who were granted a general deferment of payments at the onset of the war, under consideration of the devaluation of their properties. It did not intend, as Partsch (1909 263-4) showed, to reduce the rights of lenders. Instead of the still common private *embateusis*, a regulated adjustment process conducted by state judges, who had to take property devaluations into account, was mandated. They were to address the creditors' demands by considering not the current value of the properties but rather the value at the onset of the war, and divide the properties between creditor and debtor according to this measurement. Both parties were to estimate the former value of the property independently of each other and the judges were to support one of the two valuations. If the debtor valued it too highly and the creditor too low, the judges were to conduct their own valuation. This equitable and just valuation, "which is not based [p. 41] on positive law, but in the free and 'beautiful' discretion of the judges, is granted them twice through the law, the second time through the resumption of the first words, especially as something obviously exceeding their regular mandate" (Pringsheim 1961 90-1).

The inscription begins: *The dikastai may, if the matter appears judiciable to them but the farmer assesses more and the lender less, assess as much as seems fair to them*. The publishers of *Recueil* (1.30, §1) translate accurately: "If the judges believe that the case is not of a nature that would have to be decided according to strict law, that the evaluation of the debtor is too high and that of the creditor too low, they could estimate the amount themselves according to equity" (trans. from French).

²⁰ [=138] Zepos (1953) correctly emphasized that the change proposed by Hippodamas would have satisfied the demands of equity.

²¹ [=139] *Syll.* 364; *Recueil* I 30ff.

With the permission of this free valuation, the possibility of decisions according to equitable discretion was created for the first time, according to our sources. Significantly, it required an express legal regulation that allowed the judges to decide according to equity in one particularly set case, exceptionally under disregard of the principle of law.

VI. Equity Decisions of the Private *Diaitetai*

Aristotle reports that the Athenians would have preferred to settle their legal disputes in a court of arbitration, instead of turning to a *dikasterion* (*Rhet.* 1.13 1374b19ff: *to prefer to go to arbitration rather than the law court, for the arbitrator keeps equity in view, whereas the dicast looks to the law, and the reason why an arbitrator is appointed is that equity might prevail*). The sentence confirms our thesis that the Athenian dikasts were subject to the principle of law. Beyond that, it contains a reference to the dikasts' authority for free decisions.

By *diaitetes* Aristotle does not mean, as Steinwenter (1925 106) has convincingly shown, the *diaitetes klerotos*, who was obligatory for private suits in the 4th century BC [p. 42], with exception of the "month-suits" and inheritance *diadikasiai*, which according to general assumption served mainly to relieve the *dikasteria*.²² The verdict of a public arbitrator was therefore not suitable for circumventing a trial before the dikasts, because the dispute could be referred to a *dikasterion* upon the *epheisis* of the losing party. In contrast, the decisions of the private arbitrators, regardless of whether the parties agreed on a single arbitrator or on a council, were not subject to the scrutiny of a *dikasterion*.²³ The private arbitration courts were composed of relatives, friends, and trusted representatives of both parties. Consequently, their very composition predestined them to address both parties' interests justly. Above all, they could digress from the *Timema* of the parties and propose their own solutions and compromises.²⁴

Insight into the creation of a *diaita* is mainly provided by Isaeus' speech for Menekles' inheritance (Is. 2.30). There, he says about the members of the council of arbitrators: *those people told us that, if we were to entrust them to decide the rights of the case, they would refuse to act as arbitrators, for they did not wish to quarrel with either party; if, however, we would allow them to decide what was in the interest of all, they said they would arbitrate*. Correspondingly, this passage can only mean: Before taking on the mandate, they asked the parties whether a dutiful decision strictly following the law would be required of them. In this case, they would refuse to act as arbitrators because they would not want to antagonize one of the contesting parties. If, however, they were allowed to propose a solution agreeable for everyone involved, they would agree to accept the mandate [p.43].

Such a solution according to the *sumpheron* (beneficial) would mean nothing less than leaving aside strict law.²⁵ However, despite their far-reaching freedom in terms of the form of the trial, the private *diaitetai*, just like the state judges, apparently adhered strictly to law, unless the parties expressly allowed them to make a decision according to equity.²⁶

²² [=144] Hirzel 1900 58-9 disagrees, claiming that the public *diaitetai* were understood as an organ of equity.

²³ [=146] Isocr. 18.11; Pollux 8.57; cf. Steinwenter 1925 79 and 103.

²⁴ [=147] This follows from Aristotle, *Polit.* 2.5.8 1268b6-7.

²⁵ [=148] Steinwenter 1925 107 accurately points out that the contrast *dikaion* - *sumpheron* corresponds to the pair *dike* - *epieikes*. On the other hand, Lipsius (1905/15 224) believes that the realization should not go towards the just, but towards what is useful for all parts. This literal interpretation, however, does not logically result in a genuine contradiction between *dikaion* and *sumpheron*, which has to be alluded to here. Jones 1956 132 juxtaposes the "strictly legal aspects of the question" with the "most advantageous course to be adopted in the circumstances."

²⁶ [=149] See Steinwenter 1925 105ff. His research refers comparatively to the arbitrator in French law and especially to the development of the classical Roman law to Justinian law (*Digest* 4.8.27.2; 17.2.71), which

Whether the arbitrators always acted as in the case mentioned above, maybe even because of a legal prescription, cannot be determined. It seems, however, that the law was dominant when they had to decide strictly by law. This is also shown in §58 of the third speech against Aphobos (Dem. 29). Before the arbitrators made a decision, they indicated that, if they had to decide under oath, they would have to convict the accused for neglectful custodianship. Analogously, §21 of the speech against Phormion (Dem. 34) mentions that the arbitrator wanted to vote for the accused, who could not present any evidence, however. On the other hand, the prosecutor could invoke the *syngraphe*. Since the *diaitetes* therefore would have had to accede to the suit, he refused to decide and referred the parties to the courts.

In this manner, the refusal of Dionysodorus to agree to a private court of arbitration can finally be explained [p. 44] (Dem. 56.18). One would have expected him especially, because he was in opposition to the letter of the *syngraphe*, to want to pay interest only until Rhodes rather than until Athens and so, according to the speaker's words, did not trust in *to dikaion* but wanted *diapeiran lambanein*, to have preferred an arbitrator to an appearance before court. In truth, however, the prosecutors appeared to favor an arbitral decision, which is understandable when they could trust that the *diaitetes* would sentence the defendant to pay as long as they insisted on strict compliance with the contract and consequently with strict law (Dem. 56.18: *who would most certainly condemn him to pay the money.*)

The categorical duty of the *diaitetai* to rule according to strict law, and their merely exceptional authority to decide according to equity with the permission of the parties, can be traced into the Hellenistic period.

On the stone of Kalymna from the end of the 4th century BC, which includes an honorary decree for judges from Iasos, three types of activities of the judges were emphasized. It is said that they *resolved (the dispute) after persuading the opposing parties, arbitrated to the benefit of both parties, (or) judged by vote according to the decree of the king and the laws.*

The first and third activity obviously signify the proposal of a settlement and the decision by strict law. Here, only the meaning of "arbitrated" (*diaitan*) is interesting. Steinwenter made it probable that here there has to be seen a function of the guest judges that lies between the other two. He considers it to be an acting of the judges as *diaitetai* according to equitable discretion. If this is correct, there must have been very clearly defined criteria for when the arbitral decision is a *diaitan* and when a *krinein* (to judge). The inscription itself says nothing about this, but an obvious explanation is that the *diaitan* depended on the agreement of the parties. If there was no agreement, the guest judges had to rule according to strict law: *judged by vote according to the decree of the king and the laws* [p.45].

This assumption appears to be confirmed in the text of the honorary decree of Keos from the 3rd century BC.²⁷ It is said about the judges sent by the Ptolemaic governor Philokles that they, apart from the *diakrinai* and *dialusai*, attempted to *resolve most of these disputes well and beneficially by a preliminary referral (to arbitration) for those who made a referral both privately and publicly, through the polis, but those [transactions] (?) that they were compelled to judge without a preliminary referral, for many [they made just judgements] (?) concerning most things.* Despite the serious damage to the text, it can still be seen that the guest judges, in those cases in which they were empowered through a "referral" (*epitrope*) by the appellants, could make an equitable decision, but were otherwise forced to rule according to strict law: *they were compelled to judge.*

VII. Influences of Theory on Forensic Practice

brought arbitration closer to the state-run trial, limiting the arbitrator to strict law (CJ 7.45.13; 2.3.29.2; Nov. 82.11).

²⁷ [=155] IG. 12.5; 1065.8ff. See Steinwenter 1925 147-8.

The results of this analysis are also supported in the other literary legal sources. An influence of philosophical equity-theory on positive law is not visible. Rather, the analysis of the sources shows that the poets and philosophers always insisted on unconditional adherence to the laws. At the same time, the notion of equity appeared to be completely unknown to them until Plato. If that is the case, the notion is even less likely to occur among the people and hence in the legal assemblies.

Insofar as the works of tragedians of the 5th century BC show the potential clash between two conflicting laws, they are only concerned with which one has the higher moral weight. As Wolf (1950 254-5) has shown, even Sophocles' *Antigone* is not about the conflict between *ius strictum* and *ius aequum*; the problem lies rather in the dialectic [p.46], in the inner divergence of the *nomos agraphos* that Antigone and Creon appeal to. Here, as towards the end of Aeschylus' *Seven against Thebes* (1032ff.), Antigone does not resort to equity reasons to excuse her behavior, but insists on her inviolable sacral right to the burial of the dead.

The different philosophical schools also did not develop a doctrine of equity. For the Pythagoreans, justice consisted of pure retribution.²⁸ The Stoics demanded strictest adherence to the laws, and for the Socratics, *dikaion* was also identical to *nomimon*. Socrates sacrificed his life to this ideal, because he felt obligated to accept the sentence that was felt to be wrong, but that was the result of a lawful trial. During his defence at court and after the sentencing, when talking to friends who wanted to convince him to flee from jail, he repeatedly emphasized that the *nomos* had to be obeyed.²⁹

How close the Socratics came to the notion of equity, without recognizing it as a legal problem, shows the well-known assignment given to young Cyrus³⁰: A big boy with a coat that is too small takes away a little boy's oversized coat and instead gives the boy his own, smaller one. When Cyrus found that the result was just, he was told that as a judge he had to decide the legal question, not which coat fits which boy. The instruction culminates in the phrase that *dikaion* corresponds to *nomimon* and therefore judgement has to be made according to *nomos* [p. 47].

"For the first time in western legal philosophy" (Wolf 1950/56 2 65), the *nomou akribeia* (strictness of law) was put in contrast with the *logon orthotes* (correctness of words) by Gorgias. It is telling that such considerations found their beginning among the sophists. They questioned and qualified all outdated beliefs and values. Since the early sophists already saw one of their primary tasks as the education of students in rhetoric, especially in forensic eristic, it made sense that they also submitted the essence and continuance of the law to their critical examination (*Gorgias* 482C ff.). Already Protagoras promised to *make the lesser argument the greater* and Gorgias allegedly advertised his ability to make the worse claim appear as the better claim before a court (*Gorgias* 453A – 455A).

The fact that the sophists, for the first time, put *epieikeia* in relation to the law, also has to be understood under this aspect. Again it was Gorgias, who in the *Epitaphios*, the memorial speech for the Athenians who died in the Peloponnesian war, contrasted the *epieikes* with the *dikaion*.³¹ He praised the Athenians for having preferred merciful indulgence to complacent justice, *to praon epieikes to authades dikaion*. Through *logon orthotes* they overcame *nomou akribeia* and helped *theiotetos kai koinotatos nomos* to victory. In this, scholars have seen the anticipation of the evidence pairs of *aequitas – ius* and *verba – voluntas*. By doing this, the sophist, as Wolf claimed, "anticipated Aristotle's notion that the distributive, normative *dike* of

²⁸ [=157] See the criticism Aristotle directed towards the Pythagorean notion of law, *Nic. Eth.* 5.5 1132b21ff. *to some reciprocity seems just without qualification, as the Pythagoreans claim*. See also *MM* I.33 1194a29ff. Cf. Vinogradoff 1922 69-70.

²⁹ [=159] Plato, *Apology* 1D, 29A, 35C; *Crito* 50A ff.; Xenophon, *Mem.* 4.4.19ff.

³⁰ [=160] Xenophon, *Cyr.* 1.3.17; see Hirzel, 1907; Weiss, 1923; Wolf 1950/1956; Jones, 1956.

³¹ [=164] A significant portion of this speech has survived, see Diels-Kranz, 1959.

the laws still needed to be amended by a retributive *dike*, because otherwise the unique, special, unexpected case wouldn't be done true justice" (1950/56 2 67).

However, the method with which Gorgias wanted to reach this result already has nothing in common with the Aristotelian tenet of *epieikeia*. The sophist reached it through the *logou orthotes*: the parties, who initially relentlessly insisted on the right afforded to them by the *nomou akrikeia*, had to be persuaded by a skilled orator [p. 48] that they were wrong. Thus they would be ready to compromise and reconcile, and the *epieikeia* is realized through the art of the orator.

So understood, *epieikeia* is founded only on appearance; it is not the result of justice, but of rhetorical persuasion. It becomes exclusively the goal and purpose of the successful orator. Hence, the sophists also had not yet developed a notion of equity per se. Even if they already made rudimentary steps towards it, the unanimous refusal that met their views of the law shows that their environment reacted with an utter lack of understanding. They were consistently accused of using their teachings to replace the strict validity of the laws with rhetorical skill. The criticism ranged from Euripides (*Bac.* 890ff.) to Aristotle.³² It was an especially recurring and popular theme in comedy.³³

The contrast between abstract legal rules and concrete cases as a problem of justice is first seen in Plato. However, although he clearly recognized that the law could not regulate everything, Plato nevertheless put unmitigated adherence to the laws in the foreground of his legal doctrine.³⁴

Finally, Aristotle also adhered to this principle in his doctrine of justice, developed in the 5th book of the *Nicomachean Ethics*.³⁵ Alongside his strongly positivistic perception of law, he put the doctrine of *epieikeia*. As the following analysis will show, he did not intend with this an improvement on [p. 49] positive law but only a purely ethical education of the individual toward good. In the 5th book of the *Nicomachean Ethics*, he distinguishes between two kinds of justice, the universal (*to katholou dikaion*) and the particular (*to en merei dikaion*). The former includes all state laws that are generally binding for the people, the latter the rules that concern the relationships among individuals. This latter group is further divided into distributive (*dianemetikon*) and corrective (*diorthotikon*) justice, both of which still remain in the sphere of law. After Aristotle defines the just as the legal in this way, he concludes his investigation of the essence of justice and injustice (*Nic. Eth.* 5 1133b29ff.).

Subsequently, he becomes concerned with "the relatively irrelevant problem, compared to the gargantuan issue of the *aequitas*, of whether one could do injustice to oneself" (Dirlmeier 1956 434 n. 118, 2). In this context, he uses the word *epieikes* to label someone who is willing to demand less than he is entitled to (*Nic. Eth.* 5 1136b 20: *for the equitable man takes less*).³⁶ Then he follows with an investigation of the essence of *epieikeia*.³⁷

Starting with the problem that the written law, because of its generalized wording, could not achieve a correct ruling for some individual cases, the philosopher gives the following definition in *Nic. Eth.* 5 1137b26: *and this is the nature of the equitable: a correction of law where it is lacking because of its universality; so epieikeia is superior to some forms of dikaion but not to dikaion per se.*

In this respect, the words of Aristotle represent exactly what we understand by equity today. However, his conclusion [p. 50] cannot be seen independently of the context he puts it in.

³² [=169] *Rhet.* 2.24 1402a23ff.; cf. Wolf, 1950/56.

³³ [=170] Eupolis fr. 146, 160 in Meineke, 1847. See also fr. 95. Aristophanes, *Clouds* 114ff., 657, 888; *Acharnians* 705; *Birds* 1448-9.

³⁴ [=172] *Republic* 2 359A; *Epist.* 8 354E. See Jones 1956 68-9; Michelakis 1953 6ff.

³⁵ [=173] *Nic. Eth.* 5 1129a35-6, 1129b11ff.

³⁶ [=176] See also *Nic. Eth.* 5 1138a1.

³⁷ [=177] "In order to avoid the easily misunderstood 'equity' (*Billigkeit*)," Dirlmeier translates *epieikeia* as "benevolence in justice" (*Güte in der Gerechtigkeit*).

While the modern term “equity” is connected to legal practice, the Aristotelian *epieikeia* is related to the *epieikes anthropos*, about whom the philosopher wants to explore whether he inflicts injustice on himself through his placableness. Consequently, the conclusion mentioned above did not result from a specifically juristic discussion, but rather as the name for the behaviour of the “generous man”, of whom it is said in conclusion that his yielding behaviour is in accordance with justice (*Nic. Eth.* 5 1137b34-38a3 *It is plain from this who the equitable man is, for he chooses and does such things; he is not exacting in a bad sense, but takes less, although he has law as an aid; he is equitable and the state of mind is equity, being a kind of justness and not a different state of mind.*).

This *epieikeia* is certainly not meant as a legal term, but shows itself as a virtue, as the inclination to waive a right that someone is formally entitled to, but that one, if one were to act as an objective lawgiver, would not sanction and thus also should not lay claim to if accidentally accorded it by the law because of the law’s necessary generalization and imperfection.³⁸

Aristotle again treats the *epieikes* in detail in the first book of the *Rhetoric*. It has been claimed that he there gave it the special meaning of equity in the juristic sense, unlike in the *Ethics*. This assumption is already weakened by the fact that it is not clear why the philosopher, when looking for a word to denote the correction of the legal rights, should have chosen a word that he himself had already given another meaning and that otherwise was not used in this sense either before or after him. More recent work has clearly shown that the meaning of *epieikes* always remained in [p. 51] the area of the moral, the virtuous, and the placable.³⁹

Because of the completely consistent usage of *epieikes*, a double meaning that only appears in Aristotle is unlikely. In addition, the double meaning is also factually not justified because of the unmistakable similarity of his elaborations on the essence of *epieikeia* in the fifth book of the *Nicomachean Ethics* and in the chapter 13 of the *Rhetoric*.

In both sources, it is assumed that the law could not do justice to every individual case because of its generalized formulation, regardless of whether it was left vague intentionally or unintentionally by the lawgiver, or whether an exhaustive regulation was not possible because of the multitude of nuances (*Nic. Eth.* 5 1137b13ff. and *Rhet.* 1.13 1374a13-4). Both passages concern the question, which is affirmed, of whether a trial that goes beyond the purely legal can even be just. Such behavior is called *epieikes*.

However, the concordance of thoughts reaches even further. In the *Rhetoric*, as in the *Nicomachean Ethics*, the recognition of *epieikes* leads to the *epieikes anthropos* (*Rhet.* 1.13 1374b15 *If then our definition of equity is correct, it is easy to see what things and persons are equitable or not.*) This is followed by the known examples of what *epieikes* is and how to recognize the *epieikes anthropos*.

From a perspective of legal history, it has already been stressed that the examples represent a continuous chain of thoughts. However, the driving thought cannot be what we understand under juristic equity, as can already be seen in Aristotle’s [p. 52] use of the term *epieikes* to denote behaviors that are unrelated to the sphere of law. The only thing they have in common is the conduct of a decent man. Only thus can the example that the *epieikes* would rather turn to an arbitrator than to a court, since the arbitrator considered *to epieikes* (*Rhet.* I.13;

³⁸ [=179] Salomon 1937 71ff. correctly emphasizes that the principle of *nomos*-justice was not undermined by *epieikeia*. Michelakis 1953 is less clear, however.

³⁹ [=182] Radin 1934 214ff.; Michelakis 1953 28ff; Stoffels 1954 17ff, 59ff. In addition, it should be noted that *epieikeia* and *epieikes* were also not used as juristic terms in the language of the papyri; cf. SB 2.4513.3, 3.6185.11, 6817.4, 4.7439.9, 7475.9, 5.7518.16, 8513.3, *P Soc* 86.10, *P Lond.* 231.10, *P Lips.* 35.18, *P Mon* 8.6, *P Masp* 151.188. On the other hand, the term *anepieikes* appears to have a specific juristic meaning in *P Giss.* 39, 3-4 and *SB* 2.5231.6; 5275.7, but also not the meaning of “inequitable”; see Pestman 1961 72 n.4. Preisigke 1921 *s.v.*, however, translates *anepieikes* as “inequitable, relentless”.

1374b19) be included, which is often noted as falling outside the schema.⁴⁰ If the private *daitetai* only were allowed to deviate from strict law when they were expressly allowed to, this example indeed indicates the *epieikes anthropos*. The passage primarily addresses the conflicting parties with the challenge to allow *epieikes* to be applied and thus appeal to an arbitrator rather than to a court, where it was excluded.

The Aristotelian notion of *epieikeia* confirms the insight that “literary documents such as...the fifth book of Aristotle’s *Nicomachean Ethics* or chapter 13 through 15 of the first book of his *Rhetoric*...represent nothing more than a casual interest in such matters of the law” (Wolff 1945 101-2). There is also no proof elsewhere that the Greeks ever attempted to comment on especially legal problems with scientific treatises.⁴¹ This proves that it was not the intention of the philosophers to work towards an improvement of the legal institutions of the polis. Rather, they were concerned with the ethical upbringing of men to a virtuous life, even when they talked about legal matters and thereby intended not just to educate their students in the art of forensic rhetoric. Aristotle expressly confirms this assumption at the end of the 5th book of the *Nicomachean Ethics* (*Nic. Eth.* 5.11 1138b14-5): *let this be the account of justice and the other moral virtues*. Even the mere possibility that a legal notion of equity developed by the Greek thinkers influenced the positive law can therefore be largely dismissed [p. 53].

The first traces of a consideration of equity perspectives in the decision of legal matters can be found in the law of Ptolemaic Egypt. However, they characteristically occur outside the sphere of the *dikasteria*, and whether a philosophical influence affected them is not only not evident, but even unlikely.

The most important proof is the royal Prostagma Mich. I 70 (*SB* 4.7447), decreed upon a petition by Zenon in the year 237 BC. There, it says (ll. 6ff): *If he [Zenon] has become guarantor for the appearance of Kallias against Eukles, once he has produced the person, let him be released from the (penalty of) lateness; according to the same (provisions), also let whosoever guarantees (a person’s) appearance, having produced the person, be released from the guarantee and not be barred (as a result) of the lateness.*⁴²

With this ruling, the king determined that, in the concrete case, Zenon could free himself of the already due duty of accountability for a *paramone* bond, if he could still present the principal debtor, even belatedly. At the same time, the monarch ordered the ruling to likewise apply to future, identical cases.

Tellingly, Zenon had not applied to a *dikasterion* for this ruling, but directly to the king, who didn’t present his decree in the form of a sentence in a concrete legal dispute, but as a generally binding royal order.

Justifiably, Wolff sees this as an equitable decision, “that could not have been easily made by a court, which would have had to decide based on the clause, containing a set deadline, of a mortgage document” (1962 11).

P Ent 54 (M. Chr. 130) from the year 218 BC offers another hint of a potentially equitable decision. The motion is based on the following case: The petitioner, an Egyptian priest called Petoys, had leased the *kleroi* of the apparently Greek defendants Lacharas and his son Alexander. A *syngraphe* about this, which was signed by witnesses and the parties, was placed with the Monograph. [p.54] Only the sealing of the document was postponed because of the late hour. Subsequently, the lessee also received a so-called seed loan from the lessors and farmed the land. When he then demanded that they make

⁴⁰ [=185] *Rhet.* 1.13 1374b19.

⁴¹ [=187] See Wolff (1945), in opposition to such assumptions by Calhoun (1944) and Radin (1934).

⁴² [Thanks to Edwin Carawan and Josh Sosin for helping in my attempt to translate this passage from the Greek. DM]

good for the inadvertently omitted seal, they refused and evicted him from the *kleroi*, claiming that the leasing contract was void because of the missing seal. The petitioner opposed this and appealed to the king (ll. 9ff.): *direct Diophanes the general to write to Stratios, the epistates, to send [Lachares and son] to Diophanes to be judged on my claims, and if true, not to permit them to eject me from the farm or to harvest [the fields Petoys sowed] until the matter is resolved*

For us, the subscription by the *strategos*, which was first deciphered by Guéraud (1930 132), is of particular importance (l. 14): *To Stratios. Certainly, reconcile them; but if not, send them to me so that they may be judged by the proper tribunal.*

Before the *koinodikion*,⁴³ normally appropriate for the parties, the petitioner obviously had little hope to succeed with his claim, since the court was bound to strict law and therefore would have had to decide based on the obvious formal voidness of the contract. In order to help the lessee, the *strategos* ruled that the decision of the case, even if he himself didn't want to make it, should at least be reached not by the *koinodikion*, but by *kriterion* (tribunal). This could mean either the Chrematists or the court of *strategoi*. In any case, in order for the subscription of the *strategos* to make sense, it would have needed to refer to a court with greater freedom of decision than a *dikasterion*.

In both of the cited cases, reasons of equity are not indicated by a single word. Against the possibility that the influence of a philosophical notion of equity nevertheless took hold [p. 55] here speaks above all the special form in which the decisions were made. In the first case, the decision was made by an authoritarian order and in the second case it was expressly taken away from the responsible *dikasterion* and referred to a royal authority. This striking consistency indicates that a "royal word of authority" (Wolff, 1946, p. 11) was required, which was based on the absolute ruling power of the Hellenistic monarch and only accorded to the king or a royal authority.

The Aristotelian *epieikeia* appears to enter the courts only much later. Pringsheim's research (1921 643ff, 1931 185ff, 1932 78ff) shows us that it was taken up by Byzantine jurists and began its triumphal procession onto the area of the law as *aequitas*.

⁴³ [=192] The *koinodikion* was responsible for legal conflicts between Greeks and Egyptians. See Seidl, 1962; Wolff, 1962.